SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 98

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and Appellants below,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and Appellee below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1257

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
COMMENTS ON PETITIONERS' SPECIFICATION OF ERRORS

(A) It was not necessary for the Circuit Court of Appeals in the instant case to interpret the Barco policy on the point of when the time of waiver for the payment of premiums began. That was not the question before the court. The question decided by the court is succinctly expressed by it on page 57 of its opinion, (126 Fed. (2d) p. 56), as follows:

> "The gist of the claim for reinstatement, therefore, is that the policy was thus cancelled by reason of a mutual mistake between Barco and the insurer, due to a lack of knowledge and belief of the then existing fact that Barco was totally and permanently disabled, which fact, if known, would have prevented the cancellation of the policy. Whether these conditions created a mutual mistake of fact legally operative to vitiate the cancellation is the sole question for our decision."

The Circuit Court of Appeals in its opinion did not repudiate the doctrine in the Marshall case as to when the period of waiver for payment of premiums began to run. On the contrary the court so far as was necessary inclined toward the Marshall opinion on that point. The court's decision was not based upon an interpretation of the policy on the point in question but on a state of facts

which make an interpretation unnecessary. The court said, at page 57:

> "Barco thus knew, at the time he defaulted in the payment of the premium and prior to the surrender of the policy for cancellation, that he then was, and for more than three months had been, totally disabled. He also then knew, or was charged with knowledge, that such total disability for a period in excess of three months was considered total and permanent disability under the terms of his policy. His misconception as to the permanency of his disability had no effect whatever upon his contractual rights under the policy. His was a mistake of judgment, not of fact, and it bore no relation to his religious beliefs."

So, regardless of whether the Circuit Court of Appeals did or did not adopt the rule in question, announced in the Marshall case, becomes immaterial by reason of the fact that Barco's rights to disability benefits ripened upon the continuance of his recognized disability for a period of three months. With knowledge of these facts, and after the expiration of the three months, to-wit: on July 27, 1938, Barco surrendered his policy for cancellation and was paid its cash value.

(B) In this specification, the petitioners urge that the court erred in holding that the Florida law would not reinstate the Barco policy.

The Florida rule contended for is the one holding that furnishing notice of disability will be waived if existing circumstances make its furnishing impossible or unreasonable. The court in its opinion recognized the Florida law to be as stated by the petitioners, and said, at page 57:

> "But this principle gives no refuge to these appellants for several reasons. The communication of notice was not at all impossible. The record shows that Barco, for a period of at least a year subsequent to the incurrence of his disability, was able to discharge some business. He negotiated the transaction involving the surrender of his policy and the acceptance of its cash value, and, a full year later, was able to file suit to compel the reinstatement of his policy after his negotiations to procure that result without litigation had failed."

We do not know that we can add anything to what the court has said on this point, but it may be helpful if we should set forth the facts under which the Florida Supreme Court has held that furnishing of notice of disability would be waived. The three cases on which petitioners rely are:

> **Franklin Life Ins. Co. v. Tharpe,** 178 So. 300, 130 Fla. 546 (Jan. 7, 1938);
>
> **Hallowes v. N. Y. Life Ins. Co.,** 184 So. 7, 133 Fla. 872 (July 14, 1938);

Reliance Life Ins. Co. v. Lynch, 197 So. 723, 144 Fla. 50 (May 28, 1940).

In the case of the **Franklin Life Ins. Co. v. Tharpe,** supra, it was contended that the insured did not pay a premium when due, or furnish proof of his disability within the period fixed by the policy. Justice Brown, in a concurring opinion, said, on page 308:

> "Now as to the insured himself, the question, which it seems to me is the main question of fact in the case, was whether the evidence showed that the mental and physical condition of the insured was such as would excuse performance by him with regard to furnishing to the company proof of his total disability. This question was determined by the court below in favor of the plaintiff, appellee here, and under our well-established rule this determination should not be set aside on appeal unless it was clearly erroneous. We can not say that this conclusion of the chancellor from the evidence was clearly erroneous."

In the case of **Hallowes v. New York Life Ins. Co.** (Fla.) 184 So. 7, the court said on p. 11:

> "Undoubtedly, the terms of the contract contemplated that such 'due proof' should be furnished by the insured to the company during his lifetime.
>
> The real question upon which this case turns is

whether Mr. Hallowes, the insured, was legally excusable for not furnishing these 'due proofs' of permanent disability before his death. They were furnished by his executors with reasonable promptness after his death. These provisions of the policies with refernce to the furnishing of proofs of permanent disability were undoubtedly intended to prevent the company from being imposed upon. But in this case the evidence overwhelmingly shows that Mr. Hallowes was desperately ill from April 5, 1933, until his death on August 21st following. He was not physically or mentally in any condition to make these proofs. Nor was it shown that his wife (who was a beneficiary as to the life insurance only) knew anything about these policies or their provisions with refernce to the furnishing of proofs, and his son acted promptly as soon as he became convinced, a week before the end came, that his father's disability was presumably permanent. But before Mr. Bacon could secure the affidavits of the physicians, and furnish the 'due proofs' to the Company, Mr. Hallowes died. The law does not require the impossible, and in this case it indubitably appears that the furnishing of these proofs of disability to the Company or its officers was not possible until after Mr. Hallowes' death. The evidence shows that his family did not entirely give up hope of his recovery until, a few days before his death, they took him to Philadelphia for the last time. Under such circumstances the failure to furnish due proofs of

such disability to the Company's home office during the life time of the insured was practically impossible, and, as we see it, legally excusable; and the failure to do so should not therefore, relieve the Company of liability for the disability payments to which Mr. Hallowes was entitled under the terms of the policies."

In the case of the **Reliance Life Ins. Co. v. Lynch,** (Fla.) 197 So. 723, the court said, at p. 724:

"It appears to us that the real question presented for a decision is whether or not the insured was legally excusable for failure to furnish proof satisfactory to the company while the policy was in force that he had become totally and permanently disabled for life by bodily injury or disease and thereby effected a waiver of premium payments. The policy provides that due proof of such disability must be submitted during the life time of the insured and prior to or within three months after default in any premium payment. * * * *

"It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence. Thus a default may be excused by

the physical or mental incapacity of the insured or the claimant under the policy. It seems that the excuse offered for default in submitting proof of total and permanent disability under the terms of the policy was the physical condition of the insured as he was taken sick in July, 1931, immediately went to his bed, and was subsequently moved to a hospital, where he died. The record shows that the insured was unable to attend to his business and was delirious much of the time and was physically unable to advise the insurance company of his total and permanent disability from the time of his seizure with the illness until his death due to the ravages of the disease upon his body and mind. The beneficiary of the policy was ignorant of the terms of the policy and due dates of the premiums, and after the death of her husband so notified the insurance company."

(C) Under this subdivision, the petitioners find fault with the court's statement:

> "It is affirmatively alleged and proved that Barco acknowledged himself to be so disabled."

The court here was speaking of a total disability.

While this objection is an immaterial one, we make the following observations: In the bill of complaint, filed by Mr. Barco on August 24, 1939, in paragraph III, (Tr. p. 252), it is alleged:

> "That at the time of said concellation, and for some time prior thereto, and ever since, plaintiff was and has been totally and permanently disabled within the meaning of said policy, Plaintiff's Exhibit "A". That although plaintiff attempted to continue to maintain his law office, he was, by reason of said disability, prevented from substantially performing every part thereof. Plaintiff did not at said time know the cause of his disability, nor that it was total and permanent within the meaning of said policy."

In the supplemental bill of complaint filed by the Executrix of Mr. Barco, in paragraph (c), (Tr. p. 4), it is alleged:

> "That at the time of said cancellation of said policy, and continuously for more than three months prior thereto, and continuously thereafter until the date of decedent's death on October 10, 1939, decedent was totally and permanently disabled within the meaning of said policy, Plaintiffs' Exhibit "B"."

Thus it is conceded that at the time of the cancellation of the policy on July 27, 1938, Barco was totally and permanently disabled. Whether Barco had actual knowledge of his total and permanent disability in April, 1938, is altogether immaterial for the reason expressed by the court on page 57 of its opinion:

> "Barco thus knew, at the time he defaulted in

> the payment of the premium and prior to the surrender of the policy for cancellation, that he then was, and for more than three months had been, totally disabled. He also then knew, or was charged with knowledge, that such total disability for a period in excess of three months was considered total and permanent disability under the terms of his policy." (126 Fed. (2d) 56, 57.).

Mr. Barco did not need to know at the time he surrendered his policy for cancellation that he had been totally and permanently disabled for a period of three months. The policy created this presumption for him. He was charged with knowledge of the provisions of his policy. So, the objection that is made under this heading, that Barco did not acknowledge in April, 1938, that he was then totally disabled, has no force in view of the provisions of the policy.

Respectfully submitted,

CRATE D. BOWEN
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